?BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
%Dated: 23.04.2019

Date of Reserving the Judgment
Date of Pronouncing the Judgment
29.03.2019
23.04.2019

*CORAM
THE HONOURABLE MR. JUSTICE R.PONGIAPPAN

+S.A(MD)No.856 of 2009

#Selvaraj
... Appellant
Vs.

$1.Rajan (died)
2.Pandian
3.Anandan ... Respondents

(Respondents 2 to 3 are brought on record
as LRs of the deceased first respondent
vide order dated 11.08.2009)
Prayer: This Second Appeal is filed under Section 100 of Civil Procedure Code, to call for the records pertaining to decree and judgment in A.S.No.46 of 2005 passed by learned Sub Judge, Pudukkottai dated 31.10.2007 reversing the judgment and decree in O.S.No.112 of 1996 passed by District Munsif cum Judicial Magistrate, Keeranoor dated 15.09.2004 and to set aside the same.

!For Appellant : Mr.K.P.Narayanakumar

^For Respondents 2 & 3: Mr.N.Balakrishnan

:JUDGMENT

The plaintiff in O.S.No.112 of 1996 is the appellant herein. He has filed the suit in O.S.No.112 of 1996 on the file of the District Munsit Cum Judicial Magistrate-s Court, Keeranur, as against the first respondent/defendant for the relief of declaration declaring that the plaintiff is the absolute owner of the suit property and also for the relief of injunction restraining the defendant and his men from interfering with his peaceful possession and enjoyment of the suit schedule property. By judgment and decree dated 15.09.2004, the learned District Munsif Cum Judicial Magistrate, Keeranur, allowed the suit and granted decree in favour of the plaintiff.

2.Aggrieved over the said findings, the deceased first respondent Rajan filed an appeal before the learned Subordinate Judge, Pudukkottai, seeking the relief to set aside the decree passed by the learned District Munsif Cum

Judicial Magistrate, Keeranur, in A.S.No.46 of 2005. By judgment and decree dated 31.10.2007, the learned Subordinate Judge, Pudukkottai, allowed the appeal and set aside the decree passed by the learned District Munsif Cum Judicial Magistrate, Keeranur. Feeling aggrieved by the same, the appellant/plaintiff has filed the present Second Appeal.
3.For the sake of convenience, the parties are referred to as, as described by the trial Court.

4.The averments made in the amended plaint, in brief, are as follows:~
The suit schedule property is the absolute property of one Nagappan Chettiar, who is the maternal grandfather of the plaintiff. On 23.01.1942, the said Nagappan Chettiar mortgaged the suit schedule property along with other properties by usufructuary mortgage in favour of one Subramaniam Chettiar. Thereafter, the mother of the plaintiff Meenakshi Aachi, who is the daughter of Nagappan Chettiar, discharged the said mortgage and purchased on 16.07.1994 from her mother Angammal. Ever since from the date of purchase, the suit schedule property is in possession and enjoyment of the said Meenakshi Aachi. On the western side of the suit property, by putting the thatched shed, the plaintiff enjoyed the same. The mother of the plaintiff Meenakshi Aachi enjoyed the suit schedule property along with her son Pichaiya. Since the said Pichaiya was died in the year 1978, the plaintiff enjoyed the suit property along with his mother. Subsequently, after the demise of his mother, the said suit schedule property is in absolute possession of the plaintiff. Since the defendant interfered with the possession of the suit property, the plaintiff filed the suit.

5.The averments made in the written statement filed by the defendant, in brief, are as follows:~
The description of the property given in the plaint is not correct. There is no club viz., Narayanapillai Coffee Club, as the southern boundary for the suit property. The southern boundary for the suit property belongs to one Ramasamy in which Narayanapillai Coffee Club had been then run. But the said club had been closed nearly 40 years back and thereafter, the said property had been purchased by Jambulingam Servai. Now only the mother of the plaintiff Meenakshi Aachi had purchased the suit property. The mother of the plaintiff, who in turn, had sold the same to Chittupillai by means of registered sale deed dated 22.04.1955 for proper consideration and since then, she had been in possession and enjoyment as the absolute owner. On 20.02.1958, the said Chittupillai sold out the suit property in favour of one Kandan Chettiyar through a registered sale deed. This defendant came to occupy the said property nearly 30 years back as a lessee under the Kandan Chettiyar and he had been running a cycle shop and sound service centre. On 01.10.1965, through sale deed, the defendant purchased the said property from Kandan Chettiyar. After the purchase, the house tax was paid by him and he had also obtained the power connection and enjoyed the same for the past 25 years. The defendant has been continuously running his cycle shop and sound service centre. The plaintiff never constructed any thatched shed in the suit property. Further the patta alleged to have been issued during Natham re~settlement in favour of the plaintiff, is illegal. The plaintiff has no pre~existing title. Issuing the patta in favour of the plaintiff, does not confer any right. In fact, the plaintiff came to the village very recently.

The suit is liable for dismissal.

6.The averments made in the additional written statement filed by the defendant, in brief, are as follows:~

The defendant prescribed the title by way of adverse possession.

7.Based on the above said pleadings, the learned District Munsif cum Judicial Magistrate, Keeranoor, had framed necessary issues and tried the suit.

8.Before the trial Court, on the side of the plaintiff, two witnesses were examined as P.W.1 and P.W.2 and 6 documents were marked as Ex.A.1 to Ex.A.6. On the side of the defendant, two witnesses were examined as D.W.1 and D.W.2 and seven documents were marked as Ex.B.1 to Ex.B.7.

9.Having considered all the materials placed before him, the learned District Munsif cum Judicial Magistrate, Keeranoor, granted decree of injunction in favour of the plaintiff.

10.In appeal, after elaborate enquiry, the learned subordinate Judge, Pudukkottai, set aside the decree passed by the trial Court. Feeling aggrieved by the same, the appellant/plaintiff has filed the present second appeal.

11.At the time of admitting the Second Appeal, this Court has formulated the following Substantial Questions of Law, for consideration:~
?i) Whether the Appellate Court is right in allowing the appeal on the strength of the secondary

evidence without considering the admissibility of the secondary evidence against the primary evidence as enumerated Section 65 of the Evidence Act?

ii) Whether the first appellate Court is right in allowing the appeal on the basis of Exs.B1 to B3 though not been proved by the defendant without considering Sections 103 and 104 of Evidence Act??

12.It is not in dispute that as per the case of the plaintiff his mother Meenakshi Aachi purchased the suit property on 16.07.1944 from her mother Angammal. As per the case of the plaintiff, after purchase, by succession, being the son of Meenakshi Aachi, the plaintiff was in possession and enjoyment of the suit property.

13.On the other hand, it is the specific case of the defendant that on 22.04.1955, one Chittupillai purchased the suit schedule property from the Meenakshi Aachi and in turn the said Chittupillai sold out the said property in favour of Kandan Chettiyar. Subsequent to the purchase, the Kandan Chettiyar made out the sale in favour of the defendant through sale deed dated 01.10.1965. The sale deed dated 22.04.1955 stands in the name of

Chittupillai, was marked as Ex.B.1 and the sale deed dated 20.02.1958 stands in the name of Kandan Chettiyar, was marked as Ex.B.2 and the sale deed stands in the name of the defendant dated 01.10.1965, was marked as Ex.B.3.

14.So, accordingly, as per the case of the plaintiff, no sale was made by the Meenachi Aachi till her death. On the other hand, according to the defendant, on 22.04.1955 itself, the said Meenakshi Aachi sold out the property in favour of the Chittupillai. Since both the plaintiff and defendant have not filed the original sale deed stands in favour of the respective party, we have to decide only based upon the secondary evidence let in by either side. Now, in respect to the copy of the sale deed submitted on either side before the trial Court, no one can make any objection. Essentially, secondary evidence is an evidence, which may be given in the absence of that better evidence which law requires to be given first, when a proper objection is given. The said rule which is a most universal one.

15.In this case, for the reasons best known, the defendant has not produced the original sale deed. However, the certified copies of the sale deeds marked as Ex.B.1 to Ex.B.3, in fact those documents were issued by competent authority only after comparing the same from the original. So non~production of the original, that means the primary evidence alone, is no way helpful in favour of either side. However, on go through the entire pleadings set up by the plaintiff and defendant, in the written statement itself, the question of title having by the plaintiff was denied. It is true that filing of Ex.B.1 to Ex.B.3, will create a cloud over the property, now claimed by the plaintiff. Therefore, it is settled proposition that when there was a cloud indicated over the title by other side, it is the duty caste upon the party, who asked the relief of injunction, to prove his title or otherwise at least he has to prove the settled possession. Since the title itself is disputed on the side of the defendant, it is necessary to see the description of the property found in Ex.A.2, which is the copy of the sale deed stands in the name of Meenachi Aachi, which reads as follows:~
i& fpuhkk;]h;nt 45eph; 2byl;lh; b]z;L 63f;Fs;;gl;l rj;jpuk; ej;jj;jpy; bghd;da;ah gps;is tPl;ow;F bjw;F kJiu nuhl;ow;F nkw;F ehuhazgps;is fhgp fpsg;gpw;F tlf;F rj;jpuk; fhyp];jyj;jpw;F fpHf;F ,jw;Fl;gl;l fpHf;F ghh;j;j Tiu tPL fl;Lf;nfhg;g[rfpjKk; fpHnky; $hjpmo 28 « bjd;tly; mo 12f;Fs;gl;lJ khdJ khd tPL xd;Wk;.

16.Now on go through the description of the property found in Ex.B.1, which is the copy of the sale deed executed by the Meenachi Aachi in favour of Chittupillai, in fact on whole reading of the said document, will disclose that the same was executed by the Meenachi Aachi for herself and also on behalf of the plaintiff. In the said sale deed, the description of the property was mentioned as follows:~
epy tptuk; jpUr;rpuhg;gs;sp $py;yh i& $py;yh nghh;l;L rufj;jpw;F cs;gl;l g[Jf;nfhl;il hpo Fsj;j}h; jhYfh tpuhypkiy]g;hp bfhlk;ghD}h; tl;lk; frtD}h; fpuhkk; rh;nt 45 eph; 2 tJ byl;lh; br 63f;Fs;gl;l rj;jpuk; ej;jj;jpy; bghd;idahgps;istPl;Lf;F bjw;F~ i&uh9thpapy;ypjpUj;jy; ,e;e urPjpy;

kPdh\pak;khs; rk;kjp VII~~kJiu nuhl;ow;F nkw;F uhkrhkpf;nfhdhh; kidf;Fk; vd; fhyp];jyj;jpw;fFk; tlf;F rj;jpuk; fhyp];jyj;jpw;F fpHf;F ,jw;Fs;gl;l fpHf;F ghh;j;j TiutPLk; fl;Lf;nfhg;g[rfpjKk; fpHnky; $hjpao 28 « bjd;tly; $hjpao 12f;F cs;gl;lJ FHp 3 3/8 cs;s kidaplk;];jyj;ij Rj;jf;fpuak; bra;J bfhLj;jp[Uf;fpnwd;?

17.Now, a comparative study of description found in Ex.A.2 and Ex.B.1, it is apparent that the mother of the plaintiff Meenakshi Aachi sold the northern portion alone after retaining the southern portion from the property purchased through Ex.A.2. Only because of the said reason, the southern boundary was mentioned in Ex.B.1 as ?vd; fhyp];jyj;jpw;Fk; tlf;F.? The property which was sold out by the Meenachi Aachi in favour of the Chittupillai alone is in the hand of the deceased first respondent/defendant by successive transfer. Now, on go through the plaint, the plaintiff filed the suit for the entire property which was purchased by his mother through Ex.A.2. However he mentioned the extend of property as 28« x 12 feet which is nothing but the measurement relating to the house which was purchased by the Meenachi Ammal in turn sold the same to the first defendant. So the plaintiff filed the suit without mentioning the correct description and correct extent of property which retains by his mother. Now the receipt issued by the Tamil Electricity Board and House tax marked as Ex.B.4 and Ex.B.5, will prove that the defendant is in possession of the suit property.

18.On the other hand, on the side of the plaintiff, the patta stands in the name of the plaintiff was marked as Ex.A.4. Now on go through the said document, the patta has not been issued in accordance with sale deed stands in the name of the Meenachi Aachi. It is settled law that the entries made in the revenue records does not confer any right. In general, during the time of second appeal, interference with the facts of the case is not necessary. However, the facts and circumstances in this case reveal if the correct facts are not identified, there will be a chance for miscarriage of justice.

19.In this case, now appreciating the description of the property found in Ex.B.1 with Ex.A.2 and Ex.A.4, there was a clear discrepancy found in the measurement in the north~south direction and thereby, the plaintiff approached this Court without specific title. In general, for obtaining the relief of injunction the party, who asked the relief, has to prove the title and possession. Even though, the documents relied on by the plaintiff, will be the document for the possession. Since the extent of title is having difference with the property purchased by his mother, it is not fit for granting relief of injunction in favour of the plaintiff.

20.In the result, the Second Appeal is dismissed by confirming the Judgment and Decree, dated 31.10.2007, passed in A.S.No.46 of 2005 by the learned Subordinate Judge, Pudukkottai reversing the Judgment and Decree dated 15.09.2004 passed in O.S.No.112 of 1996 on the file of the learned District Munsif cum Judicial Magistrate, Keeranoor. No costs.

To

1. The Subordinate Judge, Pudukkottai

2. The District Munsif cum Judicial Magistrate, Keeranoor.

3.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.